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In The

Supreme Court of the United States

October Term, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondent.

PETITIONERS' REPLY BRIEF

David M. Lascell
Counsel of Record
Robb M. Jones
Michael A. Hausknecht
NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys for Petitioners
Office and Post Office Address
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000

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ARGUMENT

A. *The Meaning of Program-Specificity under Title IX is Squarely Raised.*

The government in its brief in opposition to the petition for certiorari continues a course of calculated obfuscation which not only does injustice to the Petitioners, but does injustice also to the Third Circuit which relied on the interpretation of Title IX advanced by the government before it. The government now concedes the Third Circuit reached an erroneously broad interpretation of Title IX, yet asks this Court to ignore the error, deny review, and thus terminate aid to innocent students, despite the opposite conclusion of another Court of Appeals on the same matter. *See Hillsdale College v. HEW*, No. 80-3207 (6th Cir. Dec. 16, 1982) (hereinafter *"Hillsdale"*). The government urges this position, it submits, because the Third Circuit's holding (as opposed to its reasoning) is correct and "not seriously dispute[d]" by the Petitioners, who are said to urge issues before this Court which are not presented by the case.

The government misconstrues the issues presented, as well as Petitioners' position. Petitioners query whether a private college which itself neither receives nor distributes federal aid, but whose students receive direct federal grants, can nonetheless be subject to regulation under a statute which applies only to an "education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). Contrary to the government's claim, the meaning of "program-specificity" under Title IX is squarely raised by this question.

As correctly perceived by both the Third Circuit majority and Judge Becker's concurring opinion (A31; A43), the crucial question Petitioners raise is how to reconcile regulation of a college which concededly operates no program receiving federal funds with Title IX's program-specific command. Recognizing that federal assistance given directly to students could not be tied to any specific program at Grove City, both

the Third Circuit majority and Judge Becker's concurring opinion concluded that program-specificity could not be satisfied by accepting the government's facile argument, repeated before this Court, that Grove City becomes a recipient of "Federal financial assistance" under Title IX merely because it benefits from students' use of federal money for tuition payments, and that therefore once its recipient status is assumed, program-specificity is irrelevant and the College is perforce required to execute an Assurance of Compliance with Title IX. The government's argument fails because, unless one considers the entire college to be a program, there is no program capable of being regulated under Title IX.[1].

Both the Third Circuit majority and Judge Becker's concurrence recognized this conundrum and concluded that finding Grove City to be a recipient of "Federal financial assistance" required, *in the first instance,* resolution of the meaning of "program-specificity" under Title IX. Once having correctly perceived that program-specificity had to be confronted, both the Third Circuit majority and Judge Becker ultimately concluded that the only means of reconciling Title IX coverage over Grove City with program-specificity was to hold the entire institution to be a program subject to Title IX. (A31, n. 28; A43)[2].

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[1]Unlike the circumstances in *Hillsdale College,* there are no "campus-based" student assistance programs in existence at Grove City. Therefore the Sixth Circuit's conclusion that the Hillsdale campus-based grant and loan programs are subject to Title IX, while indisputably correct, has no application to the direct student grants at issue herein.

[2]The government is simply wrong when it tries to draw a distinction between Judge Becker's treatment of program-specificity and that of the majority. As the Third Circuit majority recognized (A31-32, n. 28):

> Despite Judge Becker's claims that we ought not to address anything other than refusal to execute the Assurance of Com-

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As the government itself concedes (Brief at 8), this institutional approach of the Third Circuit markedly conflicts with *North Haven Board of Education v. Bell*, ____ U.S. ____, 102 S. Ct. 1912, 72 L.Ed.2d 299 (1982) (hereinafter *"North Haven"*). Rather than confront the issues raised by the Third Circuit's error, however, the government now asks this Court to assume the very jurisdictional issue which is at the heart of the case — whether, despite the fact that it neither receives nor distributes assistance, Grove City was properly characterized as a recipient of "Federal financial assistance" within the meaning of Title IX.

Petitioners seriously dispute the government's and the Third Circuit's conclusion that it is such a recipient and maintain that their conclusion rests on an illogical and fallacious interpretation of Title IX program-specificity. The only logical reconciliation of direct student aid with program-specificity is to hold that, within the meaning of Title IX, direct student grants do not constitute "Federal financial assistance" to the educa-

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pliance, he too agrees that we must respond to Grove's primary argument that "Program-specificity cannot co-exist with a construction of Title IX that subjects Grove to regulation because of its receipt of [non-earmarked] BEOG Funds." Concurring op. typescript at 3. He would answer that argument precisely as did the amicus in its brief we have quoted, *see* typescript at 26, *supra*. The answer thus given in the concurring opinion is no different than the answer we have been obliged to provide, and which appears in text above. Our answer, which also subscribed to the *amicus* argument, and Judge Becker's endorsement of that argument, reveal no difference in the conclusions reached: namely, that where indirect, non-earmarked funding is involved, the "Program" must necessarily embrace the entire college. Moreover, just as we have concluded that we are obliged to answer Grove's argument, Judge Becker also recognizes that this argument made by Grove must be answered.

tional institution.[3] The only alternative is to accept the Third Circuit's reasoning and give Title IX institutional scope, a conclusion clearly rejected by Congress.

Instead of considering direct federal assistance to students to be "Federal financial assistance" to the educational institution, Petitioners submit that those portions of student grant proceeds which are ultimately paid to Grove City should be considered payments for educational services, much in the same manner that social security recipients spend their government funds for food, rent, and other expenses.[4] In that situation it has never been seriously argued that this makes the grocery store or the landlord a recipient of federal aid. *Accord, University of Richmond v. Bell,* 543 F. Supp. 321, 330 (E.D. Va. 1982). The Third Circuit disagreed, relying substantially on post-enactment legislative history to find a purported Congressional intent to include direct student aid within the ambit of Title IX. (A16-20).

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[3]We urge the Court also to reject the equation of "indirect" and "non-earmarked" aid engaged in by the Third Circuit and Amici below. (A27). There can be little doubt that if the government provided the College with a blanket grant of aid to spend at its discretion, then the institution itself would logically be the "program" receiving Federal financial assistance. There is no such blanket aid at issue herein. Moreover, to equate the BEOG grants, which are used by students at virtually every college or university in the United States, with such non-earmarked direct assistance would write program-specificity out of the Title IX and gut the regulatory limitation imposed by Congress. The Third Circuit and Amici have in any event created a straw man. Historically, federal aid to higher education has been extended either in programmatic grants or in the form of student assistance. When student assistance is extended directly to students without the intervention, selection, or control of the educational institution, there can be no program at the educational institution which is subject to Title IX regulation.

[4]Students receiving BEOG grants have virtually unlimited discretion to spend those grants for any educational purpose. They do not have to be spent for tuition or any institutional charges. *See* 34 C.F.R. §690.51(1981).

Contemporaneous legislative history, however, demonstrates a different intent. Petitioners submit that Congress by its conscious use of program-specific language meant to exclude from Title IX those forms of aid where the government pays the individual recipient directly without the intervention, selection, or control of the educational institution.

That legislative history, while admittedly sparse, is nonetheless illuminating. *See Hillsdale,* slip op. at 15; *Rice v. President and Fellows of Harvard College,* 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 1976, 72 L.Ed.2d 444 (1982). Senator Bayh, the chief Senate sponsor of Title IX, stated his contemporaneous view as to the scope of Title IX application as follows:

> It is unquestionable in my judgment, that this would not be directed at specific assistance that was received by individual students, . . .

117 Cong. Rec. 30408 (1971). Later, amplifying on this remark, Bayh engaged in the following colloquy during Congressional oversight hearings on the Title IX regulations:

> Mr. Quie. I am talking about whether the Department of Health, Education, and Welfare has overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs.
>
> Senator Bayh. You know, I just don't know. I would have to look that up if you would like; perhaps you know. That is not generally the kind of penalties that are meted out, as I am sure you realize.
>
> Mr. Quie. But I have heard it claimed that that is one of the reasons why they have jurisdiction.
>
> Senator Bayh. I have not.
>
> Mr. Quie. You have not.

Sex Discrimination Regulations: Hearings Before the Subcomm. On Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess., 183 (1975) (hereinafter *"Sex Discrimination Hearings"*).

The legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq*, upon which Title IX was modeled, also demonstrates that Congress drew a line between direct student assistance programs and those student assistance programs which were operated by the educational institution. Then Deputy Attorney General Nicholas Katzenbach wrote to Representative Emmanuel Celler, then Chairman of the House Judiciary Committee, expressing the following limitation on Federal financial assistance:

> A number of programs administered by Federal agencies involve direct payments to individuals possessing a certain status . . . . [T]o the extent that there is financial assistance . . . *the assistance is to an individual and not to a "program or activity" as required by Title VI.*

Hearings on Civil Rights: H.R. 7152, As Amended by Subcomm. No. 5 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess., Ser. 4, pt. IV, 2772, 2773 (1963) (emphasis added).

Similarly, Senator Ribicoff remarked before the Senate that direct payments to individuals were not included as Federal financial assistance under Title VI:

> The individual who receives a direct payment has a right. It has nothing to do with Federal assistance to an individual, but a direct payment. Direct payments are not covered in any way by Title VI.

110 Cong. Rec. 8424 (1964).

This conclusion is confirmed by the exemption from Title VI of an educational benefits act for orphans of veterans which was administered almost identically to the current BEOG

Alternate Disbursement System. *See* War Orphans Educational Assistance Act, Pub. L. 85-857, §1731, 73 Stat. 1192, 1197-98 (Sept. 2, 1958). Explaining the House bill which eventually became Title VI, Senator Humphrey confirmed the exclusion of this student assistance program from the reach of Title VI:

> The title does not provide that individuals receiving funds from government agencies under Federally assisted programs — for example, widows, *children of veterans,* homeowners, farmers, elderly persons living on Social Security benefits — would be denied the funds they receive.

110 Cong. Record 11848 (1964) (emphasis added).

Congress' decision that direct payments to individuals does not equal assistance to the educational institution makes practical as well as logical sense. When assistance is extended by the federal government directly to individual students, the educational institution they ultimately choose to attend has no capacity to discriminate within the student assistance program, as both the choice of beneficiary and the amount of the benefit are determined by the government. If, therefore, the only power that the government seeks to assert is to regulate any program or activity receiving Federal financial assistance, then the government need look no further than its own operations to ensure that the BEOG program is operated free of sex discrimination.

B. *There is a Conflict in the Circuits Regarding the Assurance of Compliance Requirement.*

Similarly erroneous is the government's complementary argument that the Third Circuit properly ordered students' grants terminated because of Grove City's refusal to sign an Assurance of Compliance. Throughout this litigation, Grove City has argued that even if it could be deemed a recipient of Federal financial assistance, it could not properly be forced to execute HEW Form 639A — the Assurance of Compliance

(A124-133), because that document, by its terms and by its reference to existing Title IX regulations (A106-123), applied those regulations to the entire educational institution. While the government now appears to contend otherwise (Brief at 7, n. 7), historically it has been its consistent position that the "receipt" of Federal aid for any purpose subjects an entire educational institution to regulation in all of its programs or activities. This was its position on oral argument before the Third Circuit, as well as its position when Grove City was first commanded to sign the Assurance.

The Department's own fact sheet accompanying the Title IX regulations unequivocably confirms the Assurance's institutional scope:

> [T]he final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives federal funds for any of those programs.

HEW Fact Sheet accompanying the final Title IX regulations (1975). Communicating to a House Committee when the Title IX regulations were first promulgated, then HEW Secretary Weinberger reiterated the *Fact Sheet's* interpretation and also confirmed that even if the only assistance being "received" by a college or university is limited to students receiving federal grants or loans, the entirety of the institution would still be subject to all of the Title IX regulations:

> . . . if students attending an institution of higher education are receiving benefits under the various Federal educational assistance programs, then *all* of the institution's activities that are supported by tuition payments of the students can be said to be receiving Federal financial assistance. (emphasis in original)

Sex Discrimination Hearings at 438; Letter of HEW Secretary Weinberger to Hon. James G. O'Hara, Chairman, House Subcommittee on Postsecondary Education, July 2, 1975, reprinted in *Sex Discrimination Hearings*, at 488.

In the face of its own statements and the commonly understood interpretation of the Title IX regulations' scope, the government can hardly argue now that the Assurance can be saved by interpreting it in a program-specific manner. In fact, no court has agreed with the government that the Assurance can be so interpreted. In *Hillsdale*, the Sixth Circuit emphatically rejected the same argument the government makes here, agreeing with Hillsdale that the Assurance and the accompanying Title IX regulations, as written, could not be made program-specific. Slip op. at 24. The Third Circuit endorsed the Department's long-standing institutional interpretation of the Assurance's effect. A direct conflict in the circuit courts thus exists on the Assurance of Compliance issue. While the government now takes the anomalous position that neither circuit is correct, it remains the fact that in virtually identical circumstances, the Third Circuit has ordered termination of students' BEOG grants because of a college's refusal to sign an Assurance of Compliance, while the Sixth Circuit reached the opposite conclusion.[5].

C. *It is Fundamentally Unfair to Subject Colleges in the Third Circuit to a Different Rule of Law From that Prevailing in Other Circuits.*

The BEOG program at issue in this case is one of the most widely-used federal student assistance programs. Virtually every institution of higher education has students receiving BEOG monies. Accordingly, the Third Circuit's institutional approach has obliterated Title IX's program-specific limitation for virtually all of the educational institutions in that circuit. Even though the government now contends that it will not follow the *Grove City* court's reasoning on program-specificity, it cannot simply change its mind regarding the interpretation of Title IX and hope thereby that there will be no effects from this precedent. The fact remains that unless the

[5]The documents in question were the same.

Supreme Court acts now, Grove City and all other colleges and universities in the Third Circuit must live with this decision and conform to its dictates. Already, private litigants have used the *Grove City* precedent to subject other colleges to an institution-wide interpretation of Title IX. *See, e.g., Haffer v. Temple University,* 688 F.2d 14 (3rd Cir. 1982). Two other circuits have expressly rejected that institutional approach to Title IX. *See Hillsdale, supra,* slip op. at 18; *Rice, supra,* 663 F.2d at 338. Despite the govenment's disclaimer, there is a direct conflict in the circuits and this Court should step in and remedy the confusion caused by this concedely erroneous interpretation of Title IX.

CONCLUSION

To avoid such arbitrary injustice, the petition should be granted and the case set for plenary consideration. Alternatively, the Court should grant the petition, summarily vacate the Third Circuit's judgment, and remand for further consideration in light of *North Haven* and the government's revised position.

February 4, 1983

Respectfully submitted,

David M. Lascell
Counsel of Record
Robb M. Jones
Michael A. Hausknecht
NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys for Petitioners
Office and Post Office Address
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000